

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
FRANCINE CIVELLO,

Plaintiff,

-against-

CONOPCO, INC.,


Defendant.  
-----X

**VICTOR MARRERO, U.S.D.J.:**

On May 3, 2021, Defendant Conopco, Inc. filed a letter motion requesting a pre-motion conference to obtain guidance with respect their intended motion to dismiss the Second Amended Complaint. (See Attached Letter.) After reviewing the submission, including the parties' correspondence, the Court does not believe a conference is necessary at this time. Instead, the court is inclined to treat the parties' pre-motion letters as a motion to dismiss, See Kapitalforeningen Lægernes Invest. v. United Techs. Corp., 779 F. App'x 69, 70 (2d Cir. 2019) (affirming the district court ruling deeming an exchange of letters as a motion to dismiss), but if further briefing becomes necessary the Court will direct the parties to file additional material.

**SO ORDERED:**

Dated: New York, New York  
02 June 2021

  
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Victor Marrero  
U.S.D.J.

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20 Civ. 1173 (VM)  
ORDER

May 3, 2021

**Via E-Mail**

Honorable Victor Marrero, U.S.D.J.  
U.S. District Court for the Southern District of New York  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Courtroom 15B  
New York, NY 10007-1312

Re: *Civello v. Conopco, Inc.*, Case No. 1:20-cv-01173-VM

Dear Judge Marrero:

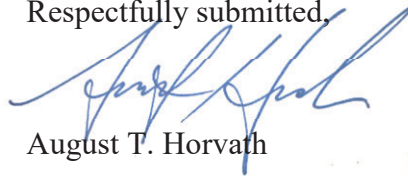
This firm represents defendant Conopco, Inc., in the above-captioned matter. I write pursuant to the Court's Individual Rules, Part II.B, on behalf of both parties, to inform the Court that the parties have completed the letter exchange and negotiation process under Part II.B.1 of the Individual Rules, with respect to Conopco's intended motion to dismiss the Second Amended Complaint (Dkt. 10), for failure to state a claim and on other grounds. The parties have not resolved the subject matter of the intended motion after this exchange of letters, which were copied to the Court on February 10 and February 17, 2021, and which are also submitted herewith. Following this exchange of letters, the parties conferred by telephone and have agreed that they remain at impasse as to the motion. Therefore, this letter is to notify the Court, pursuant to Part II.B.2 of the Individual Rules, that a motion to dismiss remains warranted, and to respectfully request that the Court schedule a pre-motion conference or take other such action as the Court deems appropriate.

The attached correspondence details the reasons why a motion to dismiss is still warranted. To summarize, although Plaintiff amended the Complaint following the parties' initial exchange of pre-motion correspondence relative to the First Amended Complaint, Conopco still believes that the Second Amended Complaint fails to allege that the labeling of Conopco's Breyers Delights Vanilla Bean Ice Cream (the "Product") is misleading to consumers or that the Product contains artificial flavors. Conopco also believes that Plaintiff's claims are preempted by FDA regulations, that Plaintiff has no standing to claim injunctive relief, and that the several secondary causes of action are improper or inadequately pled. Plaintiff disagrees with each of these positions, as set forth in Plaintiff's response, and Plaintiff declines to further amend the Second Amended Complaint.

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Accordingly, the parties respectfully request that the Court schedule a pre-motion conference or take other such action as the Court deems appropriate.

Respectfully submitted,



August T. Horvath

Cc: Spencer Sheehan, counsel for Plaintiff Civello